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In The

Supreme Court of the United States

October Term, 1992

LEONARD E. HELLER, Secretary, KENTUCKY CABINET FOR HUMAN RESOURCES,

Petitioner,

v.

SAMUEL DOE, by his Mother and Next Friend, Mary Doe, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED

1. May Kentucky, consistent with the equal protection clause of the fourteenth amendment, involuntarily commit mentally retarded adults to state treatment facilities under a clear and convincing standard of proof, while requiring proof beyond a reasonable doubt for involuntary commitment of mentally ill adults?

2. May Kentucky, consistent with the equal protection clause of the fourteenth amendment, permit third persons to participate as if they were parties in the involuntary commitment of mentally retarded adults when they are not permitted to participate as if parties in the involuntary commitment of mentally ill adults?

3. May Kentucky, consistent with due process of law, permit third persons to participate as if they were parties in the involuntary commitment of mentally retarded adults?

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The respondent class of mentally retarded adults in Kentucky embraces persons of different skills and potentials. While many need a range of supportive services to live and participate in the life of the community, few require institutional care or should be subjected to the loss of liberty that results from institutionalization. Kentucky would lessen for mentally retarded adults the procedural safeguards against unwarranted confinement by treating them less favorably than mentally ill adults and by allowing third parties extraordinary and unwarranted control over the civil commitment process. The Court of Appeals for the Sixth Circuit properly found that there was no constitutional justification for doing so.

STATEMENT OF THE CASE

This is a civil rights action filed in 1982 by Samuel Doe and a class of mentally retarded adults to bring to a halt the institutionalization of mentally retarded adults under circumstances in violation of the United States Constitution. Respondents are persons who have been admitted or who face admission to an intermediate care facility for the mentally retarded (ICF/MR) operated by petitioner, Kentucky Cabinet for Human Resources (CHR). R.50: Defendant's Answer, ¶ 4.

In 1976, Kentucky enacted a statutory scheme governing involuntary civil commitment. Ky. Rev. Stat. Ann. (K.R.S.) Chapters 202A, "Kentucky Mental Health Hospitalization Act," and 202B, "Kentucky Mental Retardation Hospitalization Act." These provisions were themselves a response to a 1975 U. S. District Court decision insisting

on adequate procedural protections for persons facing civil commitment.[1]

In an important respect, however, the 1976 law was a dead letter. Rather than provide the procedural safeguards required by law for the involuntary admission of mentally retarded adults, CHR, as a matter of policy, characterized as "voluntary" virtually every commitment to a state mental retardation facility, using an informal admissions process called the Record Review Committee. R.36: Turner depo., Exhibit 1 at 5, ¶ C.8 at 5.

With respect to this process, the U. S. District Court for the Western District of Kentucky found that:

> The record reveals that if the retarded person is unable to understand the procedures of admission, the procedure is explained to the family accompanying him. If the family agrees to it, and if the individual signs the application with an x or is able in any other way to let the defendants [CHR] know whether he or she wants to be admitted, then that individual is considered a voluntary admission.

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[1] *Kendall v. True*, 391 F. Supp. 413 (W.D. Ky. 1975). Prior to *Kendall*, the involuntary commitment statutes reflected the theory that where an "individual is mentally ill and lacks the capacity to make a choice . . . he may then be civilly committed under the *parens patriae* doctrine." *Id.* at 417. However, the district court found that the *parens patriae* doctrine when used to uphold commitment statutes had fallen into disfavor with the courts. *Id.* For a mentally retarded person, the 1976 statute permitted involuntary commitment only upon a state district court determination that (1) he or she was mentally retarded, (2) he or she presented a danger or a threat of danger to self or others, and (3) the least restrictive alternative mode of treatment required placement in a residential facility. K.R.S. 202B.040.

> The record further reveals that no civil proceedings with regard to admissions have been instituted. The defendants consider this appropriate because they believe that nearly all admissions are voluntary rather than involuntary.

Joint Appendix (J.A.) at 65.[2]

In 1982, when this case was filed, the use of involuntary civil commitment proceedings in admitting mentally retarded persons to ICF/MRs in Kentucky was extremely rare.[3] Between 1982 and 1985 admission to an ICF/MR followed an involuntary commitment hearing on only *one* occasion. R.114: Defendant's Answers to Interrogatories at 2. The only use of the involuntary commitment procedure that Dr. Susan Turner could recall in late 1982 occurred when a mentally retarded individual wished to *leave* an ICF/MR and CHR employed the involuntary commitment procedure to prevent it. R.36: Turner depo.

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[2] Ms. Verna Fairchild, Director of CHR's Division for Institutional Care, testified regarding the Resident's Bill of Rights form. R.36: Turner depo., Exhibit 11. At the time of admission, this document may be signed by the mentally retarded person. R.35: Fairchild depo. at 14 and 42. Ms. Fairchild acknowledged that it was a state practice to consider all admissions voluntary, if the person signed the Bill of Rights form. *Id.* at 51.

[3] CHR admitted that prior to 1982 no severely or profoundly retarded person resided at Outwood as a result of a court order pursuant to K.R.S. 202A or 202B. R.29: Answers to Requests for Admission, ¶ 20. A CHR investigation at the direction of Deputy Commissioner Draper revealed "no involuntary admissions during this past calendar year [1982] to any of our MR facilities to the best of their knowledge . . . " R.37: Draper depo. at 12-13; *see also* pp. 16-17. He continued, "I think I'm correct in saying that I have the general impression that very few mentally retarded people would ever be committed involuntarily under the 202B concept to our ICF/MR facilities." *Id.* at 18.

at 27-28. By contrast, about 50 percent of admissions of mentally ill persons to state mental health facilities followed involuntary commitment procedures. R.37: Draper depo. at 21.

CHR also had a practice of permitting parents to veto a decision by an ICF/MR to seek community placement for their adult children in lieu of continued institutionalization, even when community placement was recommended by mental retardation professionals.[4] The U. S. District Court for the Western District of Kentucky ruled in respondents' favor in opinions dated March 28, 1984 and January 9, 1986. In the former opinion, the district court held that the practice of permitting parents to veto a decision by an ICF/MR to seek community placement for their adult children violated the adult children's due process rights. J.A. at 61.

In its opinion of January 9, 1986, the district court held that CHR had violated respondents' rights to equal protection by committing them without benefit of procedures guaranteed by K.R.S. 202A to the mentally ill. The court found that, of the approximately 800 persons then confined in Kentucky's four ICF/MRs, fully 100 were classified as only moderately or mildly retarded. J.A. at 64. However, the court held that, even with respect

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[4] R.34: Skarnulis depo. at 23-35, 55-56, 109-112, J.A. at 18-26, 29-30, 32-35; R.35: Fairchild depo. at 22-23, J.A. at 39-40; R.73: Middendorf depo. at 18-19, J.A. at 46-47; R.177: Mlinarcik depo. at 36, J.A. at 110; R.37: Draper depo. at 32, 68, J.A. at 40-41; *see also* R.37: Draper depo. at 36-37. CHR characterizes the parental veto right as a requirement of a federal Medicaid regulation, Pet. Br. at 11 n.3, but the record shows clearly that CHR's parental veto policy was a response to pressure from organized parent groups opposed to community placements for their adult children. R.37: Draper depo. at 40, 42.

to those classified as severely or profoundly retarded, their commitment could not be deemed voluntary as long as they were admitted on the application of someone else, including parents or guardians. *Id.* at 70. Accordingly, the court issued a preliminary injunction and granted partial summary judgment to respondents ordering CHR to do what Kentucky law required – that is, to admit severely and profoundly retarded persons to an ICF/MR only upon a judicial determination that such a commitment was appropriate. *Id.* at 73-74.

The 1986 Kentucky General Assembly responded swiftly, striking from K.R.S. 202B the section guaranteeing allegedly mentally retarded persons a judicial determination prior to commitment and adding a section defining as voluntary any commitment based on the application of a retarded person's parents or guardian. R.120: Plaintiffs' Motion for Preliminary Injunction, Appendix at 1-6.

Claiming that the new law was unconstitutional, respondents filed a motion for a preliminary injunction and/or partial summary judgment. On November 20, 1986, the district court held that (1) CHR's reliance on informal commitment procedures in lieu of the procedures formerly guaranteed by K.R.S. 202B violated respondents' due process and equal protection rights, *Doe v. Austin*, 668 F. Supp. 597, 600 (W.D. Ky. 1986), *aff'd in part, rev'd in part*, 848 F.2d 1386 (6th Cir.), *cert. denied*, 488 U.S. 967 (1988), J.A. at 83-84; (2) applications by parents or guardians for commitment of mentally retarded family members or wards were not "voluntary" commitments, *id.* at 84-85; (3) equal protection required a judicial hearing and determination prior to commitment, *id.* at 85-86;

and (4) due process required periodic review of any commitment decision. *Id.* at 87. The court ordered that there be no adult admission without a judicial determination that the criteria for involuntary admission were satisfied. *Id.* at 88-89. CHR appealed the preliminary injunction to the U. S. Court of Appeals for the Sixth Circuit.

On June 15, 1988, a panel of the court of appeals held unanimously that, while a judicial hearing was not required by the due process clause of the fourteenth amendment, it was required by the equal protection clause, since Kentucky granted such protections to mentally ill persons and failed to show any rational basis for distinguishing between mentally ill persons and mentally retarded persons on that issue. *Doe v. Austin*, 848 F.2d at 1394, J.A. at 106. The Sixth Circuit also held that, while a periodic judicial review was not required by due process, it was required by equal protection for committed mentally retarded adults, since Kentucky granted periodic judicial review to committed mentally ill adults and the court saw no legitimate state interest that would justify distinguishing between the two groups on that issue. *Id.* at 108-09. The court acknowledged that the two groups might be relevantly distinguished with respect to frequency of review and remanded that issue for consideration by the district court. *Id.* at 109 n.9. CHR's petition for a writ of certiorari was denied on November 28, 1988. *Cowherd v. Doe*, 488 U.S. 967 (1988).

A revision of K.R.S. 202B enacted by the 1990 Kentucky General Assembly again brought respondents before the court of appeals. This enactment came after the parties had submitted to the district court, on October 30, 1989, an agreed final compliance plan designed to implement the previous decisions of the Sixth Circuit and the

district court, but before the district court had acted on the plan. R.189A: Agreed Final Compliance Plan.[5]

While the agreed final compliance plan would have required Kentucky to give the same rights and procedures to adult mentally retarded persons with respect to commitment as the state gives to adult mentally ill persons, the 1990 enactment gutted those protections as far as mentally retarded persons were concerned, lowering the standard of proof required to institutionalize them and giving family members and others extraordinary influence over the commitment process.

On May 18, 1990, respondents challenged as unconstitutional various sections of the new legislation. R.201: Plaintiffs' Motion for Preliminary Injunction and/or Summary Judgment.[6] On July 1, 1991, the district court addressed four issues raised by plaintiffs, holding (1) that procedures established by the new law for voluntary admissions and for legal representation were constitutional, R.215: Memorandum Opinion at 6, 12, J.A. at 164, 168, but (2) that the failure to provide for release of voluntarily admitted adults at their own request was unconstitutional, *id.* at 165; (3) that allowing mentally retarded persons to be committed under a clear and convincing standard of proof was unconstitutional under the equal protection clause, *id.* at 167-168; and (4) that allowing third parties to participate in commitment proceedings "as if" they were parties violated respondents'

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[5] No number has been assigned this document. Since it appears on the district court docket continuation sheet between entries 189 and 190, respondents designate it R.189A.

[6] House Bill 511 (codified as K.R.S. 202B.021(2), .140, .160(2) and (3), .210, and .230).

due process and equal protection rights. *Id.* at 168. The court enjoined CHR from applying or enforcing any of the provisions found unconstitutional, *id.* at 169-170, and CHR appealed to the Sixth Circuit.

On June 1, 1992, the Sixth Circuit held that "[t]he mentally ill and mentally retarded are identical insofar as they lose their personal liberty by involuntary institutionalization." *Doe v. Cowherd*, 965 F.2d 109, 113 (1992), J.A. at 177. Accordingly, the court of appeals ruled under the equal protection clause that, since Kentucky applies the reasonable doubt standard in committing mentally ill persons, the state must apply the same standard in committing mentally retarded persons. *Id.* The Sixth Circuit also affirmed the district court's holding that Kentucky's practice of allowing third persons to participate as if they were parties in the involuntary commitment proceeding of mentally retarded adults violates equal protection and due process. *Id.*

SUMMARY OF ARGUMENT

Respondents challenge sections of a Kentucky statute governing involuntary civil commitment of mentally retarded persons. A provision allowing persons alleged to be mentally retarded to be institutionalized on a clear and convincing standard of proof, while those alleged to be mentally ill may not be institutionalized except on proof beyond a reasonable doubt, violates equal protection. Allowing family members and other third parties to participate as parties in the commitment procedure for allegedly mentally retarded persons, while not allowing the same in the commitment of allegedly mentally ill persons, also violates equal protection. This is true whether this Court deems classifications based on alleged

retardation worthy of rational basis or a higher level scrutiny.

Under rational basis analysis, the challenged classification is not rationally related to a legitimate state purpose, because it is based on alleged differences between mentally ill and mentally retarded persons that are inconsistent with the record evidence, not unlike the ordinance at issue in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1982), and because the commitment hearing is designed to determine the very fact that the state's classification prejudges – namely, whether an allegedly mentally retarded person is in fact so.

Because the challenged classification implicates an important and fundamental right – the right to be free from unwarranted confinement – this Court's decision in *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992), suggests that the classification cannot withstand equal protection analysis unless the state justifies it with a particularly convincing reason. Mindful of the prerogatives of a co-equal branch of government, this Court should also take into account the intention of Congress, implicit in the findings which preface the Americans With Disabilities Act of 1990, that classifications burdening persons with disabilities be given the higher scrutiny reserved for discrete and insular minorities. The reasons advanced by the Commonwealth of Kentucky – to accelerate the institutionalization process, to save money, and to accommodate the wishes of family members – are not particularly convincing reasons and do not remotely represent a compelling state purpose.

Permitting individuals to participate in the commitment process, and to appeal decisions with which they disagree, who represent neither the state nor the person

whose liberty is at stake, and whose interests may be, and frequently are, adverse to the interests of the person whose liberty is at stake, is a denial not only of equal protection but also of due process. It represents a burden on respondents which upsets the balance envisioned by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and severely undermines the protections guaranteed by *Vitek v. Jones*, 445 U.S. 480 (1980).

Finally, this Court should decline review of the question of whether a state may treat as voluntary the institutionalization of mentally retarded adults at the request of their legal guardians, since the issue was not among the questions presented in the petition for a writ of certiorari, is not fairly included among the questions that were presented, and is now raised by petitioner without any justification. In any event, treating such commitments as voluntary would violate both equal protection – in that it would, without justification, burden mentally retarded persons in a way not applicable to mentally ill persons – and due process. A state may not, consistent with due process, presume that the interests of legal guardians are coextensive with those of their adult wards, dispense with the procedural safeguards specified in *Vitek v. Jones* in the civil commitment of adults, or substitute for the civil commitment proceeding a guardianship proceeding which addresses none of the issues that the commitment proceeding is designed to adjudicate.

ARGUMENT

I. KENTUCKY STATE MAY NOT, CONSISTENT WITH EQUAL PROTECTION, DESIGNATE A LOWER STANDARD OF PROOF OR PERMIT PARTICIPATION OF THIRD PERSONS AS PARTIES IN CIVIL COMMITMENT PROCEDURES FOR MENTALLY RETARDED ADULTS WHEN MENTALLY ILL ADULTS FACING CIVIL COMMITMENT ARE NOT SO BURDENED.

Ky. Rev. Stat. Ann. (K.R.S.) Chapter 202A, the Kentucky Mental Health Hospitalization Act, establishes procedures for the involuntary institutionalization of mentally ill persons in state, federal, or state-approved facilities. K.R.S. 202A.011(5). K.R.S. Chapter 202B, the Kentucky Mental Retardation Admission Act, establishes procedures for the involuntary institutionalization of mentally retarded persons in like facilities. K.R.S. 202B.010(6). At issue in this case are four sections of K.R.S. 202B governing involuntary commitment of mentally retarded persons to an intermediate care facility approved by CHR for the evaluation, care, and treatment of mentally retarded persons. One section lists the procedural safeguards to be provided in the final hearing, providing that "[t]he manner of proceeding and the rules of evidence shall be the same as those in any criminal proceeding, *except that the standard of proof shall be by clear and convincing evidence.*" K.R.S. 202B.160(2), J.A. at 128 (emphasis added). The other three sections authorize participation by various third persons. A parent or guardian of the person facing commitment may hire a mental retardation professional to examine the person and submit findings to the court. K.R.S. 202B.140, J.A. at 127. Guardians and immediate family members may participate as if

parties in all proceedings, may retain counsel, may cross-examine witnesses, and may appeal a decision they consider adverse. K.R.S. 202B.160(3), J.A. at 128. Appeals may be taken not only by the Commonwealth and the person facing commitment but also by the person's "guardian, limited guardian, or other authorized representative." K.R.S. 202B.230, J.A. at 132.

Kentucky provides a similar procedure for the involuntary institutionalization of mentally ill persons except that, in the commitment hearing, "[t]he manner of proceeding and rules of evidence shall be the same as those in any criminal proceeding including the burden of proof beyond a reasonable doubt." K.R.S. 202A.076(2). Moreover, the statute nowhere confers on third persons a right to participate as if parties or the right to appeal. In this regard, the statute is in accord with Kentucky case law providing that "when a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution." *Denton v. Commonwealth*, 383 S.W.2d 681, 682 (Ky. App. 1964); *see also Messer v. Roney*, 772 S.W.2d 648 (Ky. App. 1989).

By lowering the standard of proof needed to justify commitment of allegedly mentally retarded persons, Kentucky has burdened respondents in a way the state does not burden allegedly mentally ill persons, even though the two groups are similarly situated in that they both face the threat of institutionalization. Petitioner acknowledges that, despite efforts to lower the standard of proof required for involuntary commitment of mentally ill persons, the 1990 Kentucky General Assembly declined to do so. Brief for Petitioner (Pet. Br.) at 28-29. The function of a standard of proof is to allocate the risk of error between

the litigants and to indicate the relative importance attached to the ultimate decision. *Addington v. Texas*, 441 U.S. 418, 423 (1979). Kentucky has, by insisting on the beyond-a-reasonable-doubt standard, indicated the importance it attaches, as a matter of policy, to the involuntary commitment of mentally ill persons. Equal protection requires that, absent a rational reason for disadvantaging respondents, mentally retarded persons should also benefit by that policy.

The same is true of Kentucky's decision to permit participation in the commitment process of third parties, and giving a right of appeal to those third parties, whose interests may be (and historically have been) adverse to the liberty interests of mentally retarded persons. At a time when Kentucky sought to implement a policy of providing support services for mentally retarded persons – including some then confined in institutions – in smaller, community facilities, opposition came mainly from parents of persons then institutionalized.[7] By permitting their parents, guardians, and others to participate as if parties in the commitment proceeding, Kentucky has burdened respondents in a way in which mentally ill persons are not. Indeed, by providing that involuntary commitment proceedings for the mentally ill shall be conducted like criminal proceedings, K.R.S. 202A.076(2) implicitly reserves to the mentally ill person only the right of appeal, just as the Kentucky Rules of Criminal

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[7] *See* R.34: Skarnulis depo. at 23-35, 55-56, 64, 71, and 109-112, J.A. at 18-26, 29-35; R.35: Fairchild depo. at 22-23, J.A. at 39-40; R.37: Draper depo. at 32, 68, and 70, J.A. at 40-42; and R.73: Middendorf depo. at 19, 26, and 42-43, J.A. at 46-48.

Procedure implicitly reserve that right solely to the defendant. RCr. 11.02(2).

The equal protection clause of the fourteenth amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Equal protection requires that a classification be rationally related to a legitimate end. *Id.* at 442. Whatever differences may exist between mentally ill and mentally retarded persons, "mere identification of differences is not enough; equal protection 'require[s] that a distinction made have some relevance to the purpose for which the classification is made.' " *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966), quoted below in *Doe v. Cowherd*, 965 F.2d 109, 112 (6th Cir. 1992), and *Doe v. Austin*, 848 F.2d 1386, 1394 (6th Cir. 1988). *See also Jimenez v. Weinberger*, 417 U.S. 628, 634-53 (1974) (classification must be rationally related to purpose of legislation); *USDA v. Moreno*, 413 U.S. 528, 534 (1973) (classification must be rationally related to purpose of legislation).

Ky. Rev. Stat. Ann. Chapter 202B codifies the procedures to be followed in involuntarily institutionalizing persons determined to be mentally retarded and to meet the other statutory criteria for institutionalization. K.R.S. 202B.040. That chapter includes procedural safeguards against unwarranted confinement, including an adversary hearing before a judge or jury on the issue of whether the allegedly mentally retarded person meets these criteria. K.R.S. 202B.160. Kentucky may constitutionally distinguish between those alleged to be mentally

ill and those alleged to be mentally retarded with respect to the procedural safeguards provided by statute against unwarranted confinement only if there exist differences between the two groups that justify the distinction in view of the state's purposes in crafting and enforcing the commitment statute; only, that is, if the classification is rationally related to the state's legitimate purpose.

A. BECAUSE IT LACKS A RATIONAL BASIS, THE CHALLENGED CLASSIFICATION VIOLATES EQUAL PROTECTION.

To the extent that those who are mentally retarded have a reduced ability to cope with and function in the everyday world, the state has a legitimate interest in providing for them. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442. The question here is whether, in determining whether confinement in a state institution is warranted, it is rational to treat those who are alleged to be mentally retarded differently from those who are alleged to be mentally ill. Kentucky claims that its classification is rational because there exist differences between mentally ill and mentally retarded persons that are relevant to the question of what procedural safeguards are appropriate to alleged mentally retarded persons facing civil commitment. However, CHR does not even attempt to demonstrate how the differences it alleges are relevant to the classification it seeks to defend.

1. The Challenged Classification Is Not Rationally Related to a Legitimate State Purpose Because the Differences Alleged Between Mentally Ill and Mentally Retarded Persons Are Inconsistent With the Evidence of Record.

CHR argues that (1) unlike mental retardation, which is a permanent condition requiring lifetime care, mental

illness is usually able to be treated successfully; (2) institutionalization for mental illness may cause stigmatization but institutionalization for mental retardation does not; and (3) mental retardation is not subject to the same subtleties in diagnosis as is mental illness. Pet. Br. at 31-32. A brief response by a psychologist to a single question is offered in support of the first proposition. *Id.* at 31, citing R.69: Mann depo. at 29-30, J.A. at 45. But the expert testimony of record is far from unanimous on the question of the immutability of mental retardation.

Indeed, mental retardation is not a static state: intelligence quotient (IQ) scores and adaptive behavior – the two major references for assessing mental retardation – change over time. R.34: Skarnulis depo. at 19, J.A. at 16. The use of behavior modification, adaptive equipment, and other technologies "have enabled us to [e]ffect dramatic gains in a person's level of development that weren't even considered possible one or two decades ago." *Id.* at 20, J.A. at 17. All mentally retarded persons are capable of improvement or change. *Id.* at 21, J.A. at 17. Virtually all are capable of living in the community, given adequate services. R.34: Skarnulis depo. at 72, J.A. at 32; R.177: Mlinarcik depo. at 36 and 72, J.A. at 110 and 113-14. The evidence of record here, as in *Cleburne*, is that mentally retarded persons are not "all cut from the same pattern . . . [but are a] large and diversified group." 473 U.S. at 442. Moreover, CHR's assertions with respect to the issues of stigmatization and subtlety of diagnosis are wholly unsupported by evidence.[8]

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[8] The states of New Jersey, et al. argue in their amicus brief for petitioner that mentally ill persons suffer a stigmatization that mentally retarded persons do not because, while the former are institutionalized because they are a danger to themselves or others, the latter are institutionalized only because they are unable to care for themselves. States' Brief at 8-9. This distinction finds no support in Kentucky where K.R.S. 202B.040, setting out criteria for involuntary admission to state institutions, requires a finding that the mentally retarded person "presents a danger or threat of danger to self, family, or others." K.R.S. 202B.040(1). In the ten years that this case has been in litigation, CHR has never adduced expert or other evidence in support of its claims and has failed to persuade any court that providing lesser protections to mentally retarded persons than to mentally ill persons is justified by differences between the two groups.

Whatever the differences between mentally ill and mentally retarded persons – and the evidence suggests that differences among mentally retarded individuals themselves are sufficiently wide as to render almost meaningless any comparison based on stereotypic perceptions of them as a group – CHR has not begun to demonstrate how such differences would justify lowering the standard of proof for committing allegedly mentally retarded persons or permitting third persons, with potentially adverse interests, to participate as parties in the commitment proceeding. In any event, the court of appeals properly found that the differences between mentally ill and mentally retarded persons alleged by CHR were "unsupported by any evidence in the record." *Doe v. Cowherd*, 965 F.2d 109, 112 (6th Cir. 1992).

In *Cleburne*, this Court invalidated a zoning ordinance requiring a special use permit for a proposed group home for mentally retarded persons, holding that the requirement, as applied in that case, was not rationally related to a legitimate governmental purpose. 473

U.S. at 446. That conclusion, like the sixth circuit's decision here, was based on a finding that the record did not support the classification of the group home at issue as one that needed a special permit when all other residential and commercial uses faced no such requirement. 473 U.S. at 450.

If the differences in *Cleburne* – between a group home for mentally retarded persons, on the one hand, and apartment houses, fraternity and sorority houses, hospitals and the like, on the other – were not considered sufficient to justify the classification at issue in that case, still less do the purported differences between mentally ill and mentally retarded persons – all of whom are allegedly mentally disabled and are facing the same "massive curtailment of liberty," *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) – justify the classification challenged here.

2. The Challenged Classification Is Not Rationally Related to a Legitimate State Purpose Because It Is Prejudicial to Base Hearing Procedures on an Issue That the Hearing Is Itself Designed to Adjudicate.

Ky. Rev. Stat. Ann. Chapter 202B, the Kentucky Mental Retardation Admission Act, establishes procedures for institutionalizing mentally retarded persons. The sections challenged here concern the procedures for determining whether the respondent meets the statutory criteria for involuntary commitment. *See* K.R.S. 202B.100(10) (decision on involuntary admission on completion of final hearing) and 202B.160(2), (3) (hearing procedures). The criteria themselves are set out in K.R.S. 202B.040:

> When a person who is alleged to be mentally retarded is involuntarily admitted, there shall be a determination that:
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> (1) The person is a mentally retarded person;
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> (2) The person presents a danger or threat of danger to self, family, or others;
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> (3) The least restrictive alternative mode of treatment presently available requires placement in an ICF/MR; and
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> (4) Treatment that can reasonably benefit the person is available in an ICF/MR.

As indicated above, K.R.S. Chapter 202B represents Kentucky's response, with respect to mentally retarded persons, to the holding of the district court in *Kendall v. True*, 391 F. Supp. 413 (W.D. Ky. 1975), subsequently reflected in this Court's holding in *Vitek v. Jones*, 445 U.S. 480, 495 (1980), that the liberty interest implicated in confining persons to institutions is sufficiently substantial to require procedural safeguards against unwarranted confinement.

The sections of Chapter 202B challenged here – lowering the standard of proof at the final hearing, permitting third parties, with interests potentially adverse to respondents, to participate as if parties, and permitting third party appeals – all represent an abridgement for mentally retarded persons of the procedural safeguards afforded by K.R.S. 202A to mentally ill persons facing institutionalization. Although CHR makes no serious attempt to demonstrate the relevance, the state's apparent justification for the added burdens is that K.R.S. 202B applies only to mentally retarded persons, who are, it is implied, relevantly different as a group from mentally ill persons. Pet. Br. at 32, 38. Prior to the final hearing provided by K.R.S. 202B, however, there is no finding

that the subject of the hearing is a mentally retarded person; a determination of that issue is one of the purposes of the hearing. K.R.S. 202B.040(1). Prior to an adjudication on the issue of mental retardation, the hearing subject is only *allegedly* a mentally retarded person.

In deciding what procedural safeguards should be available in the process designed to determine whether a person is mentally retarded, any appeal to the differences between mentally ill and mentally retarded persons is clearly premature. Prior to adjudication, the allegedly mentally retarded, like the allegedly mentally ill, are simply persons facing a threat of confinement by the state. Any assumption of mental retardation prior to adjudication would be literally prejudicial (*prae-judicium*). Any classification based on such a prejudicial assumption could not be rationally related to the state's purpose in providing a commitment procedure. In arguing that, for purposes of the hearing designed to adjudicate the issue of mental retardation, allegedly mentally retarded persons are due fewer procedural safeguards against error because they are mentally retarded, the state's reasoning is patently circular.

A similar argument was rejected by this Court in *Baxstrom v. Herold*, 383 U.S. 107 (1966). Persons civilly committed in New York had the right under that state's Mental Hygiene Law to de novo review by jury trial of their sanity; this right was denied to individuals civilly committed after the expiration of a penal term. The state there argued that its law reasonably differentiated between the criminally insane and the civilly insane. In rejecting that argument, this Court held that distinguishing between criminally and civilly mentally ill persons

was irrelevant to the purpose of crafting a procedure for determining the very issue of mental illness:

> Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatsoever in the context of the opportunity to show whether a person is mentally ill *at all*.

383 U.S. at 111 (emphasis in original).[9]

Clearly, *the nature of the proceeding* might justify certain procedures, such as a particular standard of proof, even in the adjudicatory hearing. Thus, a criminal prosecution in which a punitive exercise of state powers is threatened, warrants proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62 (1970) (Harlan, J., concurring). For civil commitment, in which not only facts but the meaning of the facts must be determined, a lesser standard of proof is constitutionally permissible. *Addington v. Texas*, 441 U.S. 418, 429 (1979). These standards are not predicated on any premature adjudication of the issues to be decided at the hearing. By contrast, CHR wishes to base its lower standard of proof not on the *nature of the proceeding* – a civil commitment proceeding in the case of both allegedly mentally ill persons and

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[9] The allegedly mentally retarded person is no more unlike the allegedly mentally ill person than, in *Baxstrom*, the person facing civil commitment after completing a penal term was unlike a person who had served no term. Baxstrom, who was presumably not otherwise entitled to a de novo review by jury trial of the question of his sanity, was entitled to it as long as others facing civil commitment had that right; allegedly mentally retarded persons, even if not otherwise entitled to the beyond-a-reasonable-doubt standard, are entitled to it as long as others facing civil commitment are so entitled by statute.

allegedly mentally retarded persons – but on the *nature of mental retardation*. Both the fact of mental retardation and whether it renders a person so dangerous to self or others as to warrant institutionalization are issues to be determined at the adjudicatory hearing; as both *Baxstrom* and logic teach, they cannot rationally be the basis for lesser procedural safeguards at the hearing.

Respondents here acknowledge that there may be differences between mentally ill and mentally retarded persons that have a bearing on the type of care they should receive or the frequency with which reviews of their confinement should be conducted.[10] Any such differences have no relevance, however, in the context of the opportunity to show whether a person is mentally retarded *at all*. By the very nature of a commitment proceeding designed to make that determination, differences that presuppose the determination are irrelevant.[11]

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[10] Respondents have not challenged, for example, the differences in Kentucky's review provisions for involuntarily committed mentally ill and mentally retarded persons, respectively. *See* K.R.S. 202A.051, 202B.250.

[11] Petitioner notes that, in *Kremens v. Bartley*, 431 U.S. 119, 135-36 (1977), this Court remanded an action involving institutionalization of 13-18-year-olds with an instruction to the district court that "careful attention must be paid to the differences between the mentally ill and the mentally retarded." Pet. Br. at 31. *Kremens* did not suggest that the differences would be "clearly relevant" to admission procedures, as petitioner asserts, *id.*, but noted the possibility that Pennsylvania's experience in implementing its commitment statute would shed light on the issue. 431 U.S. at 136. Here, the district and appellate courts have both paid careful attention to the differences and have concluded that they are not relevant to differences in the procedural safeguards that CHR seeks to defend. *Doe v. Cowherd*, 770 F. Supp. 354, 358 (W.D. Ky. 1991), J.A. at 167; *Doe v. Cowherd*, 965 F.2d 109, 112 (6th Cir. 1992), J.A. at 175.

B. THE CHALLENGED CLASSIFICATION DOES NOT WITHSTAND EQUAL PROTECTION ANALYSIS AT A HIGHER LEVEL OF SCRUTINY, APPROPRIATE HERE BECAUSE OF THE IMPORTANCE OF AN INDIVIDUAL'S RIGHT TO LIBERTY, AND BECAUSE CONGRESS HAS FOUND THAT INDIVIDUALS WITH DISABILITIES ARE ENTITLED TO A HIGHER LEVEL OF PROTECTION.

Even if this Court were to find that the differences alleged by CHR between mental illness and mental retardation were not only consistent with the empirical evidence of record but were also rationally related to the state's purpose in crafting the challenged civil commitment statute, both the importance of the threatened interest and the nature of the threatened class warrant closer scrutiny of the classification.

Although respondents did not argue this particular issue below, it is subsumed within our general argument that the challenged provisions violate the equal protection clause. *See* U. S. Supreme Court Rule 14.1(a). It is not, therefore, an additional question; nor does it change the substance of the questions presented in the petition. *See* Rule 24.1(a), 24.2. When respondents came before the district court in May 1990 on motions for summary judgment and preliminary injunction, R.201, the Sixth Circuit had already upheld respondents' equal protection arguments on the basis of the rational basis analysis set forth in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). *See Doe v. Austin*, 848 F.2d 1386, 1394-95 (1988). Respondents had no occasion to argue for a higher level of scrutiny either before the district court or before the Sixth Circuit, where respondents argued their case most recently on March 30, 1992. Since that time, *Foucha v.*

Louisiana, 112 S. Ct. 1780 (1992), was decided. In *Foucha*, this Court required that Louisiana put forward a "particularly convincing reason" for institutionalizing insanity acquittees on lesser grounds than the state required for institutionalizing others. *Foucha* strongly suggests a ground for urging a higher level of scrutiny for the classification challenged here and a reason to believe that the Court might apply stricter scrutiny based on Congress's finding, in connection with the Americans With Disabilities Act of 1990, that individuals with physical or mental disabilities are a discrete and insular minority.

1. Because the Challenged Classification Implicates an Important and Fundamental Right, It Cannot Withstand Equal Protection Analysis.

Freedom from bodily restraint has always been at the core of the liberty interest protected from arbitrary governmental action by the due process clause. *Foucha v. Louisiana*, 112 S. Ct. at 1785. It is clear that commitment for *any* purpose constitutes a significant deprivation of liberty. *Id.* at 1785, 1788; *Jones v. United States*, 463 U.S. 354, 361 (1983); *Addington v. Texas*, 441 U.S. 418, 425 (1979). This Court has always been careful not to "minimize the importance and fundamental nature" of the individual's right to liberty. *Foucha*, 112 S. Ct. at 1785, citing *United States v. Salerno*, 481 U.S. 739, 750 (1987). Because commitment involves physical restraint, and freedom from physical restraint is a fundamental right, the state must put forward a "particularly convincing reason" for providing different protections for different classes of people with respect to involuntary commitment. *Foucha*, 112 S. Ct. at 1788.

In providing for the commitment of mentally retarded persons under a clear and convincing standard, while requiring for commitment of mentally ill persons proof beyond a reasonable doubt, Kentucky denies to those alleged to be mentally retarded a protection it affords to those alleged to be mentally ill. The same is true of Kentucky's decision to permit the participation of parents, family members, and others as if they were parties in the commitment procedure for mentally retarded persons, including the right to appeal adverse decisions, while denying this participation in the procedures for committing mentally ill persons. CHR gives no convincing reason why all the procedural safeguards against unwarranted confinement guaranteed to those alleged to be mentally ill should not be available to those alleged to be mentally retarded.

Both groups constitute a "class of potential civil-commitment candidates." *Jones v. United States*, 463 U.S. 354, 367 (1983), quoted in *Foucha*, 112 S. Ct. at 1800 (Thomas, J., dissenting). In contrast to *Jones* and *Foucha*, there is no finding here of any criminal act on the part of persons allegedly mentally retarded that diminishes the deprivation at stake or diminishes concern about the risk of erroneous deprivation. *See Jones*, 463 U.S. at 367 & n.16. While CHR implies that differences in the nature of mental illness and mental retardation suggest that both the deprivation at stake and the risk of error are less for mentally retarded persons than for mentally ill persons, Pet. Br. at 30-32, any such differences – even if they were consistent with the empirical evidence of record, which they are not – would be irrelevant until a determination

of mental retardation was made.[12] For the purposes of the adjudication process itself, those who are allegedly mentally ill and those who are allegedly mentally retarded are indistinguishable. Even were this Court to find, however, that differences exist between *allegedly* mentally ill persons and *allegedly* mentally retarded persons that are rationally related to the state's legitimate purpose, the challenged statute would not survive a review that required the state to advance a "particularly convincing" reason for the discrimination in view of the important liberty interest at stake.

In *Cleburne*, this Court reviewed a city's zoning ordinance excluding from permitted uses a group home for mentally retarded persons, and required that differences alleged between mentally retarded persons and other groups be both relevant to the city's purposes and firmly grounded in fact. 473 U.S. at 448-50. Unlike respondents here, respondents in *Cleburne* were not *allegedly* mentally retarded persons facing a commitment proceeding crafted by the legislature to determine, among other things, whether they were mentally retarded. The interest that was threatened by the challenged ordinance in *Cleburne* was not the right to be free from unwarranted confinement but only the right to establish a home in a particular area. If that interest warranted the careful attention given by this Court to the classification challenged in *Cleburne*, even more so does the interest at stake here warrant close attention to the state's classification and to the reasons advanced to justify it. If a zoning ordinance operates to exclude mentally retarded persons from the community

[12] *See* I.A.2, *supra* at 18-22.

by denying them the right to live in a particular neighborhood, so much more does a commitment statute which could relegate them indefinitely to the confines of an institution.[13]

2. Because Congress Has Indicated That Individuals With Disabilities Are a Discrete and Insular Minority, the Challenged Classification Cannot Withstand Equal Protection Analysis.

Under Section 5 of the fourteenth amendment, Congress has the power to enforce, by appropriate legislation,

[13] CHR seeks to minimize the deprivation of liberty imposed by institutionalization, implying that civilly committed mentally retarded adults in Kentucky may leave their "residential settings" as they please. Pet. Br. at 4, 8. Nothing could be further from the truth. Sandra Mlinarcik, program director for mental retardation and developmental disabilities for Seven Counties Services, Inc., a Louisville mental health agency, poignantly suggested the realities of daily life in one of Kentucky's "residential settings:"

> When I was at Hazelwood for these assessments, everybody in a given unit was wrapped in a sheet and laid on a mat on the floor from ten to eleven-thirty every day to rest. I find it hard to believe that all of the individuals in that room all really physically needed a rest at that time.

R.177: Mlinarcik depo. at 68, J.A. at 112. Mlinarcik contrasted the routinization characteristic of institutions with the individualized care possible in more truly residential settings: "In an adult habilitation program, a person would rest during the day when they individually had a physical need to rest." *Id.* Skarnulis also contrasts the restrictive features of state institutions (distance from home and family, increased likelihood of inappropriate behaviors, depersonalization) with the advantages of community placement (in home community, surrounded by models of standard behavior, individualized attention, access to community resources). R.34 at 24-25, J.A. at 18-20.

the provisions of that amendment. Section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the fourteenth amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). By enacting legislation to enforce the equal protection clause, Congress may prohibit enforcement of a state statute regardless of whether the judiciary would invalidate the state statute under the equal protection clause absent such legislation. *Id.* at 649-50. Under Section 5, Congress may enact laws to increase equal protection guarantees, although it may not "restrict, abrogate, or dilute these guarantees." *Id.* at 651 n.10; *see also Mississippi University for Women v. Hogan*, 458 U.S. 718, 732 (1982); *Oregon v. Mitchell*, 400 U.S. 112, 128-29 (opinion of Black, J.); *id.* at 248-49 & n.31 (opinion of Brennan, White, and Marshall, JJ.) (1970). Proper regard for the special function of Congress in making determinations of legislative fact compels this Court to respect those determinations unless they are contradicted by strong evidence. *Oregon v. Mitchell*, 400 U.S. 112, 241 (1970) (opinion of Brennan, White, and Marshall, JJ.).

In the findings and purposes provisions of the Americans With Disabilities Act of 1990 (ADA),[14] Congress has given a clear indication that all forms of discrimination against individuals with disabilities should be subject to strict judicial scrutiny. Specifically, Congress made findings that, historically, society has tended to isolate and segregate individuals with disabilities, 42 U.S.C. § 12101(a)(2); that discrimination against individuals with

[14] Pub. L. No. 101-336, 104 Stat. 327 (1990), 42 U.S.C. §§ 12101-12213.

disabilities persists in such critical areas as institutionalization, *id.* § 12101(a)(3); that individuals with disabilities continually encounter various forms of discrimination, including overprotective rules and policies, *id.* § 12101(a)(5); and that

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

Id. § 12101(a)(7). In enacting the ADA, Congress declared its intent to invoke the full sweep of congressional authority, including the power to enforce the fourteenth amendment, in order to address the major areas of discrimination faced day-to-day by people with disabilities. *Id.* § 12101(b)(4).

Although this Court has previously held that one sub-group of Americans with disabilities – individuals with mental retardation – do not constitute even a quasi-suspect class, *City of Cleburne v. Cleburne Living Center*, 473 U.S. at 443, Congress, in enacting the ADA, has indicated that all individuals with disabilities, including individuals with mental retardation, should be treated as a suspect class.[15] Congress's finding that individuals with

[15] "Disability" is defined by the ADA to include mental impairments. 42 U.S.C. § 12102(2)(A). The legislative history of the ADA makes it clear that mental retardation is included

disabilities are a "discrete and insular minority . . . relegated to a position of political powerlessness" reflects the language and theory of footnote 4 of *United States v. Carolene Products Company*, 304 U.S. 144, 152-53 (1938), in which this Court articulated a basis for heightened judicial scrutiny under the equal protection clause in cases of "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[16] Respondents draw to the Court's attention the findings set forth by Congress in enacting the ADA and urge the Court to apply the level of scrutiny that the Court has itself declared appropriate in reviewing classifications that burden members of a discrete and insular minority.

Under strict scrutiny, this Court has traditionally upheld a classification only if it is necessary to serve a

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among the mental impairments Congress intended to be covered by the enactment. *See* H.R. REP. No. 485 (II), 101st Cong., 2d Sess. 51 (1990), H.R. REP. No. 485 (III), 101st Cong., 2d Sess. 28 (1990), S. REP. No. 116, 101st Cong. 1st Sess. 21-22 (1989).

[16] *Accord* Rains, *A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications*, 11 ST. LOUIS U. PUB. L. REV. 185, 201 (1992). The House Judiciary Committee also signalled its intent that classifications burdening disabled individuals receive a higher judicial scrutiny: "The powers, remedies and procedures available to persons discriminated against based on disability shall be the same as, and parallel to, the powers, remedies and procedures available to persons discriminated against based on race, color, religion, sex or national origin." H.R. REP. No. 485 (III), 101st Cong., 2d Sess. 48 (1990).

compelling governmental interest, striking down classifications either for the weakness of the interest they purport to serve or for their looseness of the fit between means and ends.[17] CHR attempts to justify reduced safeguards against unwarranted confinement in the very process designed to determine whether allegedly mentally retarded persons meet the statutory conditions for involuntary institutionalization, including whether they have mental retardation. A classification that threatens so important a right cannot be justified by an appeal to efficiency, *see* Pet. Br. at 25-26, especially when the state's desire to ease the respondents' transition into institutionalized care reflects the "overprotective policies" and "stereotypic assumptions" about their inability to participate in society that Congress, in enacting the ADA, found generally characteristic of society's treatment of individuals with disabilities. 42 U.S.C. § 12101(a)(5), (7). The record here indicates that even those whose concern for the welfare of mentally retarded adults need not be questioned may assume too readily that they need institutional confinement.[18] Kentucky insists on certain

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[17] L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-6, at 1453 (2d ed. 1988).

[18] Parents may underestimate both their adult children's capabilities, R.34: Skarnulis depo. at 109 and 112, J.A. at 32-35, and the capacity of the community to provide appropriate care in non-institutional settings. R.37: Draper depo. at 70, J.A. at 41. *See also* Karen Middendorf, director of mental retardation services at Region XIII Comprehensive Care Services, Maysville, Kentucky, on the need to counsel parents of adult mentally retarded persons "in terms of letting go a little bit, of not overprotecting, of recognizing that their child . . . is now an adult and needs to be doing adult things." R.73: Middendorf depo. at 43, J.A. at 48.

precautions to insure that persons alleged to be mentally ill do not lose their liberty on the basis of paternalistic or stereotypic assumptions. Absent weightier reasons than petitioner has advanced here, this Court should insist that the state guard with equal care the liberty of those alleged to be mentally retarded.

II. A STATE MAY NOT, CONSISTENT WITH DUE PROCESS, PERMIT THIRD PERSONS TO PARTICIPATE AS PARTIES IN INVOLUNTARY CIVIL COMMITMENT PROCEEDINGS FOR MENTALLY RETARDED ADULTS.

Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. *Addington v. Texas*, 441 U.S. at 425. Freedom from bodily restraint has always been at the core of the liberty protected by the due process clause from arbitrary governmental action. *Foucha v. Louisiana*, 112 S. Ct. at 1785, citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). This Court has always been careful not to "minimize the importance and fundamental nature" of the individual's right to liberty. *Foucha v. Louisiana*, 112 S. Ct. at 1785, quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987). The loss of liberty caused by civil commitment constitutes not only a loss of freedom from confinement, but also adverse social consequences (whether labeled as "stigma" or otherwise). *Addington*, 441 U.S. at 426. The "subtleties and nuances of psychiatric diagnoses" justify the requirement of adversary hearings. *Vitek v. Jones*, 445 U.S. at 495, quoting *Addington*, 441 U.S. at 430.

To meet due process demands, the standard of proof in civil commitment cases must be greater than the preponderance-of-the-evidence standard generally applicable in civil cases. *Addington*, 441 U.S. at 433. On the traditional presumption that parents act in the best interests of their children, a child facing civil commitment need not be afforded the same process due a person who has reached the age of 18, but some kind of inquiry should be made by a neutral factfinder to determine whether the statutory requirements for admission are satisfied. *Parham v. J.R.*, 442 U.S. 584, 604, 606 (1979). Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Connecticut v. Doehr*, 111 S. Ct. 2105, 2112 (1991).

Under the statute challenged here, a parent or guardian of an alleged mentally retarded person facing involuntary commitment may hire a qualified mental retardation professional who shall be permitted to participate in any examination of the person and may submit findings, if any, to the court. K.R.S. 202B.140. Guardians and immediate family members shall be allowed to attend all hearings, conferences or similar proceedings; may be represented by private counsel; may participate

in the hearings or conferences as if a party to the proceedings; may cross-examine witnesses; and have standing to appeal any adverse decision. K.R.S. 202B.160(3). Appeals may be taken not only by the person facing commitment but also by the person's guardian, limited guardian, or other "authorized representative." K.R.S. 202B.230.

These statutory provisions inject – into a procedure designed to balance the interests of the state and the individual – a cast of characters with interests of their own, not merely as witnesses whose testimony might aid the factfinder in reaching a decision on the issues delineated by statute but as contestants in their own right.

This Court has sought to balance the interests of the individual and the state, *Mathews v. Eldridge*, 424 U.S. 319; to tailor due process requirements to the age of the individual, *Parham v. J.R.*, 442 U.S. 584, and to the nature of the interest being threatened, *Vitek v. Jones*, 445 U.S. 480; and to allocate the risk of error between the litigants by requiring a certain standard of proof. *Addington v. Texas*, 442 U.S. 418. In all instances, those persons recognized by the Court as having a right to participate as parties for the purpose of urging their own interests are the state and the person whose interest the state is threatening. K.R.S. 202B does not threaten a liberty interest of any of the third parties to whom the challenged sections extend a role as if parties in the commitment proceedings. None of them is facing a massive curtailment of liberty; none of them is a state actor; none of them is on either side of the balance required by *Eldridge*. To permit such participation by parties whose own interests may be adverse to the

interests of respondents would skew the balance proposed in *Eldridge* and burden respondents in ways never envisioned in *Vitek*.[19]

Nor is the expanded participation justified by any state interest. Although the state asserts its interest in gathering relevant information about respondents from

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[19] The balancing described in *Eldridge* may sometimes involve several parties, each represented by counsel, as when the interests of state, child, and parent are weighed in a petition to terminate parental rights. *See, e.g., Lassiter v. Dep't of Social Serv. of Durham County*, 452 U.S. 18 (1981). The situation of the child in *Lassiter*, however, is easily distinguishable from that of the parent or guardian here. While it is the parent's liberty interest that is threatened by the state in a termination case, the interests of the child – as the other party to the legal relationship under threat – are immediately implicated. By contrast, the threat to the liberty of the mentally retarded adult facing involuntary commitment does not threaten to sunder any legal relationship between the adult and his or her parent or guardian.

The interests of Tracy Horton's parents, the petitioner asserts, were "every bit as legitimate as the Commonwealth's." Pet. Br. at 37. Perhaps so: family members and members of the general public can frequently be said to have legitimate interests in the outcome of proceedings that pit the interests of the state against the interests of an individual, but this is to use "interest" in a broader sense than it is used in *Eldridge*. The fourteenth amendment liberty interests at stake in a proceeding are determined by the narrow scope of the proceeding – here a commitment proceeding – not by the broad reach of its repercussions. The attempt to cast parents and guardians as parties with interests at stake in the commitment proceeding is part of petitioner's larger argument that the parents' interests are not really distinguishable from the interests of their adult mentally retarded children and that, accordingly, this Court should extend *Parham* to cover mentally retarded adults, that is, treat mentally retarded adults as children for purposes of commitment. Pet. Br. at 20-28. Respondents deal with that issue in Section III, *infra*.

third parties, Pet. Br. at 37, mechanisms have always been available for this purpose. The state may subpoena them as witnesses; there is no need to include them as parties.

III. THIS COURT SHOULD NOT REVIEW THE QUESTION OF WHETHER A STATE MAY CONSIDER VOLUNTARY THE CIVIL COMMITMENT OF MENTALLY RETARDED ADULTS ON THE SUBSTITUTED CONSENT OF THEIR LEGAL GUARDIANS, BECAUSE IT WAS NOT PROPERLY RAISED BY PETITIONER; ALTERNATIVELY, THE COURT SHOULD REJECT THE CONCEPT AS A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION.

Petitioner's request that this Court address the issue of whether CHR may treat as voluntary the commitment of mentally retarded adults to state institutions on the substituted consent of their legal guardians is raised in clear violation of this Court's rules. Nor does petitioner make any argument as to why the Court should suspend its rules in this instance. Were the Court to consider the issue, it should reject petitioner's contention as a violation of the due process and equal protection clauses of the fourteenth amendment.

A. BECAUSE THE ISSUE WAS NOT FAIRLY INCLUDED BY THE QUESTIONS PRESENTED IN THE PETITION FOR CERTIORARI, IT HAS BEEN WAIVED.

The question of whether Kentucky may consider voluntary the admission of an adult mentally retarded person on the substituted consent of a legal guardian is not properly before the Court. Only the questions set forth in the petition, or fairly included therein, will be considered

by the Court. Rule 14.1(a). A petitioner's brief on the merits "may not raise additional questions or change the substance of the questions already presented" in the petition for certiorari. Rule 24.1(a).

Petitioner's certiorari petition raised three questions. Petition for Writ of Certiorari at i. Petitioner again presents those same questions in his brief on the merits, *compare id.* with Pet. Br. at i, questions 2-4, and also introduces an entirely new question (stated here as a proposition): "CHR's admission of mentally retarded adults to its ICF/MR facilities as voluntary residents upon the substituted consent of their legal guardians and after independent professional review does not violate either Due Process or Equal Protection." Pet. Br. at i, question 1. More than 40 percent of petitioner's argument is devoted to the improperly raised question. *See* Pet. Br. at 18-28.

In *Princeton University v. Schmid*, this Court stated, with respect to a dispute over a regulation that had been amended while the case was on appeal, "We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us." 455 U.S. 100, 102 (1982). Similarly, CHR's new question would have this Court render an advisory opinion concerning an issue now moot: the Kentucky statute which once defined as voluntary any commitment based on the application of an allegedly mentally retarded person's parent or guardian was repealed in 1990.

In *Irvine v. California*, 347 U.S. 128, 129 (1954), the Court refused to take up questions "smuggled into" the case after certiorari had been granted. *See also Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376, 386 n.12 (1960); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 37

n.35 (1954); *Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954) ("The fact that the issue was mentioned in argument does not bring the question properly before us"). This is precisely the situation here. The question which petitioner now wishes to insert into this case was argued before and decided by the Sixth Circuit in a 1988 opinion which this Court chose not to review. *Doe v. Austin*, 848 F.2d 1386, *cert. denied*, 488 U.S. 967. It was not raised by petitioner in arguments before the Sixth Circuit whose 1992 opinion, reported *sub nom. Doe v. Cowherd*, 965 F.2d 109, is here under review. It was not, as we have indicated, before this Court when it granted the petition for certiorari.

Although Rule 24.1(a) states that, "[a]t its option . . . the Court may consider a 'plain error' not among the questions presented but evident from the record and otherwise within its jurisdiction to decide," this power is the Court's, not a party's, and is limited, in the review of federal court proceedings, to exceptional circumstances where the errors "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936), quoted in *Silber v. United States*, 370 U.S. 717, 718 (1962), and *Connors v. Finch*, 431 U.S. 407, 421 n.19 (1977). No such circumstances are alleged here. As we have noted, the question which petitioner belatedly seeks to inject into this case was fully litigated at an earlier stage of this case. *Doe v. Austin*, 668 F. Supp. 597 (W.D. Ky. 1986), *aff'd in part, rev'd in part*, 848 F.2d 1386 (6th Cir.), *cert. denied*, 488 U.S. 967 (1988). Petitioner presents no argument as to why the issue should be relitigated years later in this forum. Respondents, accordingly, respectfully request this Court to decline consideration of this question.

B. ALTERNATIVELY, THIS COURT SHOULD REJECT, AS A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION, PETITIONER'S CONTENTION THAT A STATE MAY CONSIDER VOLUNTARY THE COMMITMENT OF A MENTALLY RETARDED ADULT ON THE SUBSTITUTED CONSENT OF A LEGAL GUARDIAN.

Persons who are unable, on account of a mental disability, to give informed consent to institutionalization do not thereby lose their right to a determination, with appropriate procedural safeguards, as to whether they meet the statutory criteria for involuntary institutionalization. *Zinermon v. Burch*, 494 U.S. 113, 133-34 (1990). Petitioner would bypass entirely the statutory procedure now embodied in K.R.S. 202B for involuntary commitment by treating as voluntary any commitment initiated on the petition of the legal guardian of an alleged mentally retarded adult. The Court should reject this argument.

1. This Court Should Reject as Inconsistent With Due Process a State's Treating as Voluntary the Commitment of an Allegedly Mentally Retarded Adult on the Substituted Consent of a Legal Guardian.

a. Because the Interests of Parents and Guardians May Not Be Presumed to Be Coextensive With the Interests of Their Adult Mentally Retarded Children or Wards, This Court's Holding in *Parham* Is Inapplicable to the Commitment of Mentally Retarded Adults.

In arguing for an extension of *Parham v. J.R.*, 442 U.S. 524 (1979), to the adult respondents here, CHR refers to *Parham's* balancing of private and governmental interests,

Pet. Br. at 21 (citing 442 U.S. at 599-600), and then states without citation to *any* authority, with respect to the private interests involved, that "the interest of parents in the health and welfare of their mentally retarded children does not cease when these children become chronological adults." Pet. Br. at 27. CHR grudgingly concedes that "mentally retarded adults have a liberty interest" in not being unnecessarily confined, *id.* at 22, but this liberty interest is not further discussed and is thereafter given no weight in petitioner's assessment of the proper balance of the interests at stake. *See id.* at 26-29. The thrust of CHR's argument is that the interests of mentally retarded adults and those of their parents and guardians are presumed to be coextensive, as this Court accepted in *Parham* with respect to parents and their minor children. *Parham v. J.R.*, 442 U.S. at 610. Indeed, petitioner argues, so indistinguishable are the interests of the mentally retarded adult and his or her family members or legal guardian that it is meaningless to regard the latter as "third" parties in the involuntary commitment proceeding. Pet. Br. at 34.

In 1988, the Sixth Circuit properly held, however, that "the traditional interrelationship of interests shared by parents and their minor children is not as presumptive as the minor passes from childhood to adulthood." *Doe v. Austin*, 848 F.2d 1386, 1392. The Kentucky legislature has admitted as much, in giving to guardians and immediate family members a right to appeal any decision adverse to them, even though the decision may not be adverse to the person facing commitment. K.R.S. 202B.160(3). "Once someone becomes an adult, one's parents lose that degree of authority found so crucial in *Parham*," the Sixth Circuit noted. *Doe v. Austin*, 848 F.2d at 1393, quoting *Clark v.*

Cohen, 613 F. Supp. 684, 699 (E.D. Pa. 1985). "Moreover, the interest of the parents in avoiding 'significant intrusion into the parent-child relationship,' as noted in *Parham*, 442 U.S. at 610, is simply not as great in the case of an adult." *Doe v. Austin*, 848 F.2d at 1393.

Not only can there be no presumption of an identity of interests between adults facing institutionalization and their parents and guardians, but guardians may have no family ties with the person facing institutionalization. K.R.S. 387.510(3) (a guardian may be any "individual, agency, or corporation" appointed by the court); *see Doe v. Austin*, 848 F.2d at 1392, quoting *Kentucky Ass'n for Retarded Citizens v. Conn*, 510 F. Supp. 1233 (1980). Moreover, the record in this case provides ample support for the proposition that the interests of parents in Kentucky have been frequently inimical to their adult mentally retarded children's liberty interests. At a time when Kentucky, as a matter of public policy, sought to place in less restrictive, community settings institutionalized mentally retarded adults who, in the judgment of mental retardation professionals, could be better served there, parents of the institutionalized adults effectively crippled the program.[20]

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[20] *See* R.34: Skarnulis depo. at 23-35, J.A. at 18-26 (parents block access of CHR Division of Community Services to mentally retarded persons for purposes of placement under New Neighbors Program), *id.* at 29-30 (parents are biggest barrier to placement), *id.* at 32-35 (parents and adult children's needs not identical; parents may lack knowledge, make inappropriate decisions, underestimate adult children's potential); R.35: Fairchild depo. at 22-23, J.A. at 39-40 (parent or guardian permitted to veto discharge of adult child or ward from state institution); R.37: Draper depo. at 69-70, J.A. at 41-42 (placement decision should be primarily in hands of mental retardation professionals); and R.73: Middendorf depo. at 19, 26, and 42-43, J.A. at

Allegedly mentally retarded adults brought before a tribunal for an adjudication of whether they meet statutory criteria for institutionalization in state facilities are entitled to presumptions of emancipation and freedom from confinement: They are simply "*potential* civil-commitment candidates." *Jones v. United States*, 463 U.S. at 367 (emphasis added). To determine the procedural safeguards to which they are entitled on a presumption that their interests, including their liberty interests, are adequately represented by their parents or guardians, is to prejudge the very issue that the commitment procedure is designed to determine – namely, that a condition of mental retardation has rendered them so dependent that institutionalization is the only available means to protect them or others from danger. K.R.S. 202B.040.

Mentally retarded persons differ widely as to their intellectual functioning and adaptive behavior; they are also capable of improved functioning over time. R.34: Skarnulis depo. at 19-21, J.A. at 16-17. Many of those now institutionalized could live in the community, given proper support. R.177: Mlinarcik depo. at 72, J.A. at 113-114. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. at 442 ("Nor are [mentally retarded persons] all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for"); *Penry v. Lynaugh*, 442 U.S. 302, 338-39 (O'Connor, J.) ("Mentally retarded persons are individuals whose

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46-48 (parental objections block release of information, discharge of institutionalized adults, to New Neighbors Program; parents counseled on not overprotecting adult children).

abilities and experiences can vary greatly.")[21] Petitioner's argument that states should be permitted to treat mentally retarded adults as perpetual children takes no account either of the differences among mentally retarded persons or of the development of which a mentally retarded individual is capable.

Parents and legal guardians have not infrequently proven adverse to their adult retarded children's liberty interests, resisting placement in less restrictive settings deemed by mental retardation professionals to be more appropriate, either because of overprotectiveness, ignorance of their adult children's and wards' capabilities, or ignorance of the capacity of the community to provide appropriate services.[22]

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[21] In *Penry*, Justice O'Connor analyzed the pitfalls in comparing mentally retarded adults with children, including the possibility that reliance on "mental age" to measure the capabilities of a retarded person for purposes of the eighth amendment "could have a disempowering effect if applied in other areas of the law." 442 U.S. at 339-40. CHR's recitation of the supposed "mental age" of allegedly mentally retarded adults, Pet. Br. at 6, provides no reliable basis for effectively disempowering them in the commitment process.

[22] *See* R.34: Skarnulis depo. at 71-72, J.A. at 31-32; R.37: Draper depo. at 32 and 70, J.A. at 40-42; R.73: Middendorf depo. at 19 and 42-43, J.A. at 46-48; R.177: Mlinarcik depo. at 36, 46-47, 68-69, 72-74, J.A. at 110-115.

The needs of adult mentally retarded children and the needs of their parents and guardians are "not synonymous." R.34: Skarnulis depo. at 109, J.A. at 33. Petitioner's argument that guardians can be presumed adequately to represent the interests of their wards, even to the point of bypassing the procedural safeguards of a hearing designed to test the state's claim that a person is mentally retarded and so dependent as to require institutionalization, is based on an assumption that mentally retarded adults are all alike, as helpless as young children. Pet. Br. at 22. That is a stereotyping to which disabled individuals have for too long been subject, as Congress recently found. 42 U.S.C. § 12101(a)(7). This Court should reject the argument for an expansion of *Parham* because it is founded on a morally unacceptable and factually inaccurate stereotype and because it is inadequate to meet the constitutional requirement of due process.[23]

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[23] In their amicus brief, the states of New Jersey, et al. note, in support of their argument that states should be permitted to employ a "less adversarial" procedure in institutionalizing mentally retarded adults, that there is a wide variation in the abilities and needs of retarded persons, that two out of every three persons with severe retardation are *not* in institutions, and that the states have made significant progress in reducing the number of mentally retarded persons in institutions. States' Brief at 14-16. Assuming the accuracy of these assertions, they support the *respondents'* argument for maintaining, rather than eroding, the procedural safeguards against an unwarranted deprivation of liberty. The states, moreover, would press *Cleburne* into service, noting this Court's comment that states should have "a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts." States' Brief at 15, quoting *Cleburne*, 473 U.S. at 445. This comment occurs, however, in a discussion of the need for heightened scrutiny of classifications burdening mentally retarded persons. While this Court held then that heightened scrutiny was not warranted, it certainly lent no support to the view that mentally retarded adults facing institutionalization should enjoy any fewer procedural safeguards than those specified in *Vitek v. Jones*, 445 U.S. at 494-495. Respondents have no desire to see the states "forced into a common, uniform mold." States' Brief at 15, quoting *Addington v. Texas*, 441 U.S. at 430-431. The issue is not uniformity but minimum guarantees consistent with due process and equal protection.

b. Because the Medical Nature of the Inquiry Does Not Justify Dispensing With the Due Process Requirements Specified in *Vitek* for Involuntary Commitment Proceedings, the Court Should Require That States Provide Adversary Proceedings for Mentally Retarded Adults Facing Institutionalization.

According to petitioner, the issues involved in the commitment procedure are "whether the ward is mentally retarded and whether he [or she] can benefit from the available habilitation services which CHR can provide." Pet. Br. at 26. The questions, petitioner notes, are "essentially, if not overwhelmingly, medical in character." *Id.* In determining the appropriateness of such medical decisions, petitioner argues, the "supposed protections of an adversary judicial proceeding . . . may be more illusory than real." *Id.* Nor is there any "reason to believe that lay jurors are more adept in answering these medical questions than trained medical and mental retardation professionals." *Id.*

These statements disregard constitutional principles and misapprehend respondents' position. First, respondents do not contend that due process requires that

adults facing involuntary commitment be afforded a judicial hearing. *See Doe v. Austin*, 848 F.2d at 1393. At issue here is whether due process requires that respondents be afforded an adversary hearing. *Vitek v. Jones*, 445 U.S. at 494-95. In arguing that it does not, petitioner defines too narrowly the issue at stake, omitting entirely the questions of whether the allegedly mentally retarded person presents a danger or a threat of danger to self, family, or others, or whether the least restrictive alternative mode of treatment presently available requires placement in an ICF/MR. K.R.S. 202B.040(2) and (3). These clearly are issues that implicate the mentally retarded adult's liberty interest. *Foucha v. Louisiana*, 112 S. Ct. at 1784, citing *Jones v. United States*, 463 U.S. at 368.

This Court has recognized that questions that "[turn] on the meaning of facts which must be interpreted by expert psychiatrists and psychologists" are essentially medical in nature, *Vitek v. Jones*, 445 U.S. at 495, citing *Addington v. Texas*, 442 U.S. at 429, but has held that "[t]he medical nature of the inquiry does not justify dispensing with due process requirements." 445 U.S. at 495, citing *Addington*, 442 U.S. at 430. Indeed, "[i]t is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings." *Id.* The Court held, accordingly, that an adult facing civil commitment was entitled to written notice; a hearing at which the state would be required to present its evidence and the person facing commitment would have an opportunity to be heard and present documentary evidence; an opportunity to present testimony of witnesses by the defense and to cross-examine state witnesses; an independent decisionmaker; a written statement by the factfinder as to the evidence relied on; and the availability of legal counsel. *Vitek*, 445 U.S. at 494-495. Where a "massive curtailment

of liberty" was at stake, *id.* at 491, citing *Humphrey v. Cady*, 405 U.S. at 509, the Court did not rely on the possibility that these procedural safeguards "may be more illusory than real." Neither should the Court do so here. An allegedly mentally retarded person facing institutionalization is entitled to a vigorous argument of the case for freedom. The so-called "medical model" of decisionmaking offered by petitioner provides no such guarantee.

c. Because Different Issues Are at Stake in Each Proceeding, the Procedural Safeguards Available Under Kentucky's Guardianship Statutes Are Not a Constitutionally Adequate Substitute for Purposes of Involuntary Commitment.

Petitioner implies that the adversary hearing provided under Kentucky's guardianship statutes provides adequate due process safeguards for the mentally retarded adults facing institutionalization, and thus, once a guardianship exists, the guardian may "voluntarily" institutionalize a mentally retarded adult (the ward). Pet. Br. at 23-25. The Court should reject this argument. The issue at stake in the guardianship proceeding – "whether the respondent is disabled . . . in relation to the management of his personal affairs and in relation to the management of his financial affairs," Pet. Br. at 24, *see* K.R.S. 387.580(1)(c) and (d) – is entirely distinct from those at stake in the involuntary commitment proceeding. A person may be adjudicated disabled under K.R.S. 387.580 and not meet one of the statutory criteria for institutionalization under K.R.S. 202B.040. It is the clear import

of *Vitek v. Jones*, 445 U.S. 480, that due process requires an adversary hearing on the issue of the propriety of institutionalization, not merely on the issue of ability to manage one's personal and financial affairs, before a person may be civilly committed.

2. Because Kentucky Does Not Consider Voluntary the Commitment of a Mentally Ill Adult on the Substituted Consent of a Legal Guardian, This Court Should Reject as a Denial of Equal Protection CHR's Argument That the State May Treat as Voluntary the Commitment of Mentally Retarded Adults.

Although petitioner asserts that the "admission of mentally retarded adults to . . . ICF/MR facilities as voluntary residents upon the substituted consent of their legal guardians and after independent professional review does not violate . . . equal protection," Pet. Br. at 20, CHR makes no further argument in support of that proposition. Equal protection commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Center*, 473 U.S. at 439, citing *Plyler v. Doe*, 457 U.S. at 216. Petitioner neither cites, nor claims to be able to cite, any Kentucky statute which would permit CHR to consider voluntary the institutionalization of a mentally ill adult on the substituted consent of a legal guardian. While a guardian may petition for commitment of an allegedly mentally ill adult ward, such a petition would fall under the provisions of K.R.S. 202A governing *involuntary* commitment. 202A.051(3). To permit Kentucky to treat as voluntary the

commitment of mentally retarded adults on the substituted consent of their guardians would escalate to new heights the inequality in the treatment of mentally retarded and mentally ill persons of which respondents complain in the existing statute. Rather than remedy the equal protection deficiencies in K.R.S. 202B, petitioner would revert to the informal institutionalization of mentally retarded adults that existed in Kentucky until a federal district judge enjoined the practice in 1986, J.A. at 73, a procedure which used a definition of voluntariness that was "to say the least, expansive." *Doe v. Austin*, 848 F.2d at 1392.

Especially as the nation struggles to move beyond "stereotypic assumptions not truly indicative of the individual ability [of disabled individuals] to participate in, and contribute to, society," 42 U.S.C. § 12101(a)(7), this Court should resist the efforts by petitioner to turn back the clock to a time when institutionalization for mentally retarded persons was routine and procedural safeguards against unwarranted institutionalization, at least in Kentucky, practically non-existent.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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